United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2151

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES KAYLOR,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 75-2151

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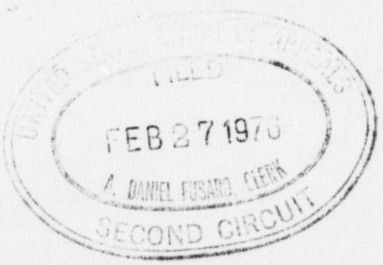
P/S

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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The Government asserts that appellant is precluded from raising in this appeal the question of the validity of the identification procedures employed during appellant's trial. This argument is based on the Government's contention, inter alia, that this issue was raised on appellant's direct appeal and alternatively, that appellant by-passed federal procedures by his failure to raise specifically the identi-

fication issue on appeal.*

POINT I

On the direct appeal from the judgment, appellant's counsel** contended in the brief, inter alia, that the trial judge's conduct and interference in the trial deprived appellant of a fair trial.*** In the course of illustrating this point, appellant's counsel argued that the trial court's partisan questioning about identification and that his interrogation of Simonian and Stolfi, who could not identify appellant at trial and of Wolverton, the truck driver, indicated

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* The Government also asserts that "appellant should be precluded from raising the identification issue because the trial court determined the issue after a full hearing" and implies that appellant requests further litigation about the facts relevant to the suggestive identification procedures employed (Government's Brief at 11). The Government misapprehends the nature of appellant's claim. Appellant contends, not that further development of facts is necessary, but that a legal determination by this Court of the consequences of the facts already developed in the record is required.

** Michael Gillen, Esq. represented appellant at appellant's trial and on direct appeal.

*** Point I of appellant's brief filed on his direct appeal reads:

> The Defendant Kaylor Was Deprived of a Fair Trial Because of the Bias Created by the Trial Court's Persistent and Detailed Questioning of Witnesses, Comments and Usurpation of the Role of Counsel.
>
> (Appellant's Brief, United States v. Kaylor, Hopkins, Docket No. 73-1530 at p. 17)

to the jurors the Judge's belief in the Government's case and "were both hostile to the defense and argumentative." Appellant's brief, supra, Docket No. 73-1530 at 18. The Government now implies that this argument involving the fairness of the trial and the Judge's conduct effectively raised the question of the suggestive identification presented as part of this §2255 proceeding (See Appellant's Brief at 17-18). Rejection of this argument comes from this Court's opinion in that case. There the issue raised by appellant was stated to be whether:

> the trial judge overstepped his duty 'as more than a moderator to clarify ambiguous questions and testimony for the jury and to insure that the trial was fairly conducted.'
>
> (United States v. Kaylor, 491 F.2d 1127, 1130 (2d Cir. 1973)

Clearly, this issue is not the equivalent one of testing the fairness of the identificaiton procedures to ascertain whether there was a likelihood of misidentification.*

POINT II

The Government also claims that the failure by appellant's counsel to question on appeal the validity of the

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* In United States v. Kaylor, supra, 491 F.2d at 1129, this Court carefully delineated the claims raised by appellant and those raised by Hopkins, appellant's co-defendant. If this Court had determined that the identification issue raised by Hopkins was similar to the claim of judicial interference raised by appellant, it would have made that determination clear.

identification procedures employed at trial amounted to a knowing by-pass of the orderly process of appeal. This too is incorrect. ". . . federal courts are not spared the burden of examining the merits of an asserted constitutional error raised in a §2255 petition simply because the petitioning federal prisoner failed to assert the error on appeal. Kaufman v. United States, 394 U.S. 217 (1969)." Randall v. United States, 454 F.2d 1132, 1133 (5th Cir), cert. den. 409 U.S. 862 (1972); Accord, Brown v. United States, 468 F.2d 897, 898 (5th Cir. 1972).

This principle applies to situations involving the failure to appeal, Fay v. Noia, 372 U.S. 391, 399 (1963) or file a brief, Humphrey v. Cady, 405 U.S. 504, 515 (1972), as well as to the failure to raise an issue on appeal, Kaufman v. United States, 394 U.S. 217, 219* (1969); Randall v. United States, supra; Brown v. United States, supra, the situation here.

Moreover, in order to show that by-pass has occurred, the Government must prove that the decision to forego raising the identification issue was the knowing and considered choice of appellant and not one made solely by counsel

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* One reason given by the District Court for rejecting Kaufman's claim of unlawful search and seizure asserted as part of a §2255 proceeding was that this issue was not raised on Kaufman's direct appeal. Kaufman v. United States, 268 F. Supp. 484, 487 (E.D. No. 1967). The Supreme Court's decision in Kaufman, supra, rejected this view.

alone.* Fay v. Noia, 372 U.S. 391, 439 (1963); Humphrey v. Cady, 405 U.S. 504, 517 (1972).** In light of this, and Judge Neaher's explicit decision not to examine the question of deliberate by-pass,*** the resolution of this issue can not be made at this stage of the proceedings but would require a further factual hearing to determine "the facts bearing upon the applicant's default."**** Fay v. Noia, supra

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* In Humphrey v. Cady, 405 U.S. 504, 517 (1972), the Supreme Court has stated:

> . . . such a waiver must be the product of an understanding and knowing decision by petitioner himself, who is not necessarily bound by the decision or default of his counsel.

** Both Fay v. Noia, supra, and Humphrey v. Cady, supra, involved claims that the petitioner by-passed state procedures. However, the Supreme Court held that the same standard used to determine by-pass of state procedures is to be applied in determining by-pass of federal procedures. Fay v. Noia, supra, 372 U.S. at 439 n. 44.

*** In his opinion, Judge Neaher stated:

> It is thus unnecessary to determine whether petitioner 'deliberately by-passed the orderly federal procedures . . . by way of appeal . . . ' Kaufman v. United States, supra, 394 U.S. at 227 n. 8.
>
> (Appellant's Appendix B at 13, n.3)

**** Williams v. United States, 463 F.2d 1183, 1184 (2d Cir. 1972) is distinguishable. There, the District Court dealt with the issue of by-pass and made specific findings about the question. Here Judge Neaher, specifically did not rule on whether by-pass occurred. Moreover, there is evidence, outside the record of this case, which indicates that, in fact, appellant requested counsel to present the identification issue as part of the direct appeal. This evidence is in the form of a letter dated October 16, 1973, directed to Mr. Michael J. Gillen, 16 Court Street, Attorney at Law, Brooklyn, New York 11241. The letter is in possession of appellant's present counsel and is part of the files given to appellant by Mr. Gillen. The body of the letter states in full:

(Continued on next page)

372 U.S. at 439; Humphrey v. Cady, supra, 405 U.S. 517; Brown v. United States, supra, 468 F.2d at 898. See also Randall v. United States, supra, 454 F.2d at 1133; Cain v. State of Missouri, 518 F.2d 1180, 1181 (8th Cir. 1975).

(continued from last page) . . .

Since being incarcerated here at Terre Haute, I have took a little interest in doing some research on legal cases which might pertain to my case.

At your convenience I think if you would refer to the below listed cases it might help us in some way: Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. XXX 440 (1969).

If you have any more news concerning the disposition in my appeal I would appreciate hearing from you.

CONCLUSION

FOR THE FOREGOING REASONS AND THE REASONS SET FORTH IN APPELLANT'S MAIN BRIEF, APPELLANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION AND SENTENCE SHOULD BE GRANTED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

February 27, 1976

I certify that a copy of this reply brief has been personally served on the United States Attorney for the Eastern District of New York

Jonathan Silbermann